THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION No.26957 OF 2005

ORDER:

This writ petition is filed seeking a declaration that Rule 29 (3) of The Andhra Pradesh Excise (Lease of Right of Selling by Shop and Conditions of Licence) Andhra Pradesh Excise (Grant of License of Selling by Bar and Conditions of Licence) Rules, 2005, as amended by G.O.Ms.No.1878, Revenue (Excise-II) Department, dated 8-11-2005 is unconstitutional and *ultra vires* the legislative competence of the State under Section 72 of the A.P. Excise Act, 1968 and for a consequential direction to the respondents not to shift the retail wine shops from their originally identified Wards to other Wards of Visakhapatnam Municipal Corporation.

In exercise of powers conferred by Section 72 read with Sections 17, 28 and 29 of the A.P. Excise Act, 1968, and A.P. Ordinance 5 of 2005, Governor of Andhra Pradesh made the Rules called A.P. Excise (Lease of Right of Selling by Shop and Conditions of Licence) Rules, 2005 (for short, 'the Rules'). The said Rules issued under G.O.Rt.No.998, Revenue (Ex.II) Department, dated 24-5-2005 are made applicable for the grant of privilege by shop, conditions governing thereof, and transport of Indian Liquor and Foreign Liquor by the leaseholder. Rules 3, 4 and 5 of the said Rules provide for grant of lease of right to sell Indian Liquor and Foreign Liquor and for establishment of shops. That apart, Rule 29 (1) of the Rules provides that the sale of liquor shall be permitted by leaseholder at the licensed premises only. However, under sub-rule (3) of Rule 29, shifting of the licensed premises is permissible for valid reasons. The said sub-rule (3) of Rule 29 under the Rules initially made under G.O.Rt.No.998, Revenue (Ex.II) Department, dated 24-5-2005 stood as under:

> *"(3) Shifting of the licensed premises may be permitted for valid reasons and subject to conditions as may be specified by the Commissioner of Proh. & Excise* ***within the same area/locality where it was originally established*** *subject to payment of Rs.10,000/- as fee."*

However, subsequently by G.O.Ms.No.1878, Revenue (Ex.II) Department, dated 8-11-2005, sub-rule (3) of Rule 29 was substituted as under:

> *"(3) Shifting of the licensed premises may be permitted for valid reasons and subject to conditions as may be specified by the Commissioner of Prohibition & Excise, subject to payment of Rs.10,000/-."*

The validity of the above Rule 29(3) as amended by G.O.Ms.No.1878, Revenue (Ex.II) Department, dated 8-11-2005, is under challenge in this writ petition.

Before going into the merits of the case, the facts, in brief, which led to the filing of this writ petition, may be noted as under:

The petitioners herein claim to be the residents of Visakhapatnam town who are interested in obtaining retail licences for sale of liquor. It is not in dispute that the District Collector, Visakhapatnam, in terms of the provisions of the Rules, issued a Notification dated 26-5-2005 inviting tenders from the intending tenderers to grant lease of right to sell Indian Liquor and Foreign Liquor by shop. Under the said notification, 51 leases were proposed to be granted in Visakhapatnam district by auction through sealed tenders. In Annexure-I to the Notification the area/locality whereunder the said leases were proposed to be granted together with respective upset prices were mentioned. It is also not in dispute that under the said Notification dated 26-5-2005 no shops were earmarked/ allocated insofar as Ward Nos.6, 19, 30 and 31 of Visakhapatnam Municipal Corporation are concerned. So far as the shops in other Wards, which were notified and earmarked under the Notification, auctions were conducted and the leases were granted to the respective successful bidders. The respondents 6 and 7 herein were the successful bidders in respect of the shops situated in Ward Nos.17 & 18, respectively. However, they could not secure suitable premises in the notified areas/localities for establishing shops and consequently could not obtain licences. In the circumstances, they sought permission along with three other similarly situated auction purchasers of Visakhapatnam Municipal Corporation for establishment of shops in areas/localities other than that were notified. While the said requests were under consideration, the petitioners herein

filed W.P.No.16315 of 2005 seeking a declaration that the action of the respondents in entertaining the requests for permission to shift the existing retail shops was arbitrary, illegal and contrary to the Rules made under G.O.R.No.998, dated 24-5-2005. This Court held that under Rule 29 (3) of the Rules, shifting of the licensed premises was permissible only within the same area/locality where it was originally established and therefore shifting of the shops from the Wards where the successful bidders were originally granted leases to different Wards could not be permitted. Accordingly, by order dated 14.09.2005 the said writ petition was allowed.

Subsequent to the said order in W.P.No.16315 of 2005, sub-rule (3) of Rule 29 of the Rules was amended by G.O.Ms.No.1878, dated 8-11-2005, thereby deleting the words *"**within the same area/locality where it was originally established**"*. The said amended Rule is under challenge in this writ petition.

Sri Vedula Venkata Ramana, the learned counsel for the petitioners contended that the impugned rule, which confers unguided and unfettered power on the Commissioner to permit shifting of retail shops has the affect of taking away the vested right of existing retail licensees and also the legitimate expectation of the person who intend to apply for new retail licences for specified territorial area and therefore arbitrary and *ultra vires* the legislative competence of the State under Section 72 of the Act.

On behalf of respondents 1 to 5, Prohibition & Excise Inspector, Visakhapatnam IV, filed a counter-affidavit stating that the petitioners 1 and 3 are licensees of Restaurant and Bar, situated in Ward Nos.29 and 4, respectively of Visakhapatnam Municipal Corporation and that the 2nd petitioner is neither a licensee of any Restaurant, Bar or a retail shop. Since there is no proposal for shifting of retail shops from any Ward to Ward Nos.2 and 4, where the petitioners 1 and 3 are having Bar licences, petitioners have no *locus standi* to challenge grant or shifting of shops to other areas. It is further stated that the request of respondents 6 and 7 to permit them to shift their shops, as there was no viability in the existing premises, was considered in the interest of Government revenue in the light of Rule 29(3) as amended vide G.O.Ms.No.1878, dated 8.11.2005 and proposals were submitted to the Commissioner of Prohibition and Excise, since their request was justified for

valid reasons. It is further stated that the contention of the petitioners that unguided power was conferred under sub-rule (3) of Rule 29 of the Rules, is untenable and that the petitioners, who do not have business interest in the Wards where retail shops are proposed for shifting, have no *locus standi,* and therefore, the writ petition cannot be maintained and liable to be dismissed.

A separate counter-affidavit has been filed on behalf of respondents 6 and 7 stating that by allowing the shifting as sought by them, the writ petitioners are not prejudiced in any manner whatsoever. It is further stated that under Rule 29(3) of the Rules, Commissioner of Prohibition and Excise while authorizing shifting of licensed premises has to give reasons, and therefore, it cannot be said that any unguided power has been conferred on him. It is also stated that Commissioner of Prohibition and Excise is yet to take a decision on their applications, and that therefore, the writ petition is pre-mature and liable to be dismissed on that ground alone.

In the light of the rival submissions made by the parties, the question that arises for consideration is whether sub-rule (3) of Rule 29 as amended by G.O.Ms.No.1878 dated 8.11.2005 is unconstitutional and *ultra* vires the Act and liable to be struck down.

Under Section 72 of the A.P. Excise Act, 1968, the power to make Rules for carrying out all or any of the purposes of the Act has been delegated to the Government in exercise of which power G.O.Rt.No.998, dated 24-5-2005 was issued making the Andhra Pradesh Excise (Lease of Right of Selling by Shop and Conditions of Licence) Rules, 2005.

The law is well settled that the delegated legislation can be challenged on the ground of being *ultra vires* the parent Act and also on account of excessive delegation. When the delegated legislation goes beyond the scope of the authority conferred by parent statute, or if the rule making authority deviates from the procedure, if any, prescribed by the parent statute for making the Rules, it is a ground for attacking the vires of delegated legislation. Similarly, where the essential

legislative functions such as determination of legislative policy are delegated by the legislature or where the power conferred on the delegate, being legislative in character, is very wide and does not contain any guidelines, such provision suffers from the vice of the excessive delegation.

In the instant case, the provision under challenge i.e., sub-rule (3) of Rule 29 as substituted under G.O.Ms.No.1878, dated 8-11-2005 cannot be held to be bad on any of the above grounds. The impugned Rule can neither be held to be beyond the scope of the authority conferred under Section 72 of the A.P. Excise Act nor in deviation from the procedure prescribed by parent statute for making the Rules. It is not as if the Government which made the impugned Rule under G.O.Ms.No.1878, dated 8-11-2005 has no substantive power under the A.P. Excise Act much less it falls outside the scope of the power conferred under the Act. It is also not a case of delegating essential legislative functions. Hence, the constitutionality of the impugned Rule is unassailable on the said grounds.

The learned counsel for the petitioners does not dispute the same, however contends that the discretionary power conferred on the Commissioner of Prohibition & Excise under the impugned sub-rule (3) of Rule 29 being uncontrolled and unguided is amenable to arbitrary exercise of power. The learned counsel submits that by deleting the words "**within the same area/locality where it was originally established**" under the impugned sub-rule (3) of Rule 29, the Commissioner of Prohibition & Excise has been empowered to permit shifting of the licensed premises anywhere in the State and thus there is every likelihood of the power being exercised contrary to the scheme and purpose of the Rules.

I n **Kishan Prakash Sharma v. Union of India**, the Supreme Court has explained the legal position as under:

> "So far as the delegated legislation is concerned, the case law will throw light as to the manner in which the same has to be understood and in each given case we have to understand the scope of the provisions and no uniform rule could be laid down. The Legislatures in India have been held to possess wide power of legislation subject, however, to certain limitations such as the Legislature cannot delegate essential legislative functions which consist in the determination or choosing of the legislative policy and of

> formally enacting that policy into a binding rule of conduct. The Legislature cannot delegate uncanalised and uncontrolled power. The Legislature must set the limits of the power delegated by declaring the policy of the law and by laying down standards for guidance of those on whom the power to execute the law is conferred. Thus the delegation is valid only when the legislative policy and guidelines to implement it are adequately laid down and the delegate is only empowered to carry out the policy within the guidelines laid down by the Legislature. The Legislature may, after laying down the legislative policy, confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of the policy."

In a recent decision in **State of Rajasthan & Ors. v. Basant Nahata**, the Supreme Court while reviewing all the decided cases on the issue held as under:

> "There cannot be any doubt whatsoever that the court shall not invalidate a legislation on the ground of delegation of essential legislative function or on the ground of conferring unguided, uncontrolled and vague powers upon the delegate without taking into account the preamble of the Act as also other provisions of the statute in the event they provide good means of finding out the meaning of the offending statute."

Thus, it is clear that the mere absence of express guidelines, in the impugned provision does not automatically render the same invalid, but it is necessary to examine whether such guidelines can be gathered from the purport and object of the parent Act as well as other provisions of the Legislation, including the Preamble and Statement of Objects and Reasons. It is also a settled principle of law that a statute must be read as a whole and one provision of the Act or Rules should be construed with reference to the other provisions in the same Act or Rules so as to avoid repugnancy between two parts of the legislation. It is the duty of the authority to exercise the discretionary power in tune with the scheme of the legislation taking into consideration all the provisions of the legislation together.

The impugned Rule 29 (3) of the Rules, if interpreted in the light of the rest of the provisions of the Rules made under G.O.Rt.No.998, dated 24-5-2005, particularly Rules 3, 4 and 5, I am unable to hold that any unguided or unfettered power was conferred on the Commissioner of Prohibition & Excise.

Rules 3, 4 and 5 of the Rules may be extracted hereunder:

> ***"3. Lease of Right to sell Indian Liquor and Foreign Liquor :***

Subject to the provisions of these rules the grant of lease of right to sell Indian Liquor and Foreign Liquor by shop shall ordinarily be granted by inviting sealed tenders from the public after due notification. The lease shall be for a period of one year or part thereof.

Provided that where the Commissioner considers it expedient to grant the lease of right to sell Indian Liquor and Foreign Liquor by shop in any other manner, he shall for the reasons to be recorded in writing, do so.

4. Establishment of Shops:-

The Commissioner of Proh. & Excise having due regard to requirement, public order, health, safety and other factors as thinks fit, may fix the number of shops to be established in an area/locality before the publication of the Auction Notice under Rule 5.

5. Auction Notice:

(1) Where it is proposed to grant the lease for sale of Indian Liquor and Foreign Liquor by shop a notice of the proposed auction containing the particulars mentioned in sub-rule (2) shall be published, at least (7) seven days in advance of the date of auction, by the Collector of the District in the District Gazette or in such other manner as the Collector may deem fit.

(2) The auction notice shall contain the following particulars:

(i) Serial Number and the name of the area/locality where the shop will be established.

(ii) The last date, time and place for receipt of tenders;

(iii) The place of auction with time and date;

(iv) The conditions governing the auction;

(v) The lease period and

(vi)Any other matter which may be considered necessary by the auctioning authority."

In W.P.No.16315 of 2005, this Court having considered the scope and object of the Rules 3, 4 and 5 of the Rules made under G.O.Rt.No.998, dated 24-5-2005 held as under:

"A combined reading of the above Rules makes it clear that the lease of right to sell Indian Liquor and Foreign Liquor by shop shall ordinarily be granted by inviting sealed tenders from the public. Before issuing such auction notice, the Commissioner of Prohibition & Excise has to fix the number of shops to be established in an area/locality. It is also relevant to note that Rule 5 of the Rules specifies the particulars to be mentioned in the auction notice which include the name of the area/locality where the shop will be established."

It was also held as follows:

> "Under Rule 4 of the Rules, the Commissioner has to fix the number of shops to be established with particular reference to a particular area or locality having due regard to the requirement, public order, health, safety and other factors. In exercise of the said power, the 2nd respondent - Commissioner, under his proceedings, dated 25-5-2005, having fixed the number of shops to be established in the Municipal Corporation of Visakhapatnam in the specified wards, did not choose to include Ward Nos.6, 19, 30 and 31. As expressed above, on a combined reading of Rules 3, 4 and 5, it is clear that the lease of right to sell Indian Liquor and Foreign Liquor by shop by way of public auction can be granted only in respect of the shops fixed by the Commissioner of Prohibition & Excise in the particular area/locality identified by him and in no other area/locality" (emphasis supplied).

In the light of the above interpretation given to Rules 3, 4 & 5 of the Rules in W.P.No.16315 of 2005, holding that the lease of right to sell liquor by shop by way of a public auction can be granted only in respect of the shops fixed by the Commissioner of Prohibition & Excise in the particular area/locality identified by him in the notification, the power conferred under the amended sub-rule (3) of Rule 29 of the Rules cannot be interpreted as empowering the Commissioner to permit shifting of the shop to a locality/area other than that was identified by the Commissioner in the notification.

The scheme of the Rules made under G.O.Rt.No.998, dated 24-5-2005 as can be gathered from Rules 3, 4 & 5 itself provides adequate guidance to carry out the legislative policy and the Commissioner of Prohibition & Excise has to exercise the discretionary power without defeating the basic scheme of the Rules made under G.O.Rt.No.998, dated 24-5-2005. Hence, the impugned sub-rule (3) of Rule 29 of the Rules cannot be held to be ultra vires the legislative power under Section 72 of the Act or unconstitutional. The deletion of the words '**within the same area/locality where it was originally established**' by itself did not render the power conferred on the Commissioner of Prohibition & Excise, arbitrary or unguided. However, in a given case if the authority is found to have exercised his discretion contrary to the scheme enunciated under Rules 3, 4 and 5 of the Rules, such decision can be struck down as arbitrary and illegal.

From the counter-affidavit filed on behalf of the respondents 1 to 5, it is clear that on the basis of the request made by the respondents 6 and 7, the proposals for

shifting of the shops of the respondents 6 and 7 are still under process and the 3rd respondent has not yet passed any orders. In the circumstances, it cannot be presumed that the 3rd respondent would act contrary to the scheme of the Rules.

In the result, though the writ of mandamus as prayed for cannot be granted, the Writ Petition is disposed of with the above observations as to the scope of Sub-rule (3) of Rule 29 of the Rules as amended by G.O.Ms.No.1878, dated 8-11-2005. No costs.

Needless to mention that the interim order shall stand vacated.

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G. ROHINI, J.

Dt. 25–04-2006

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***THE HON'BLE MS. JUSTICE G.ROHINI**

+WRIT PETITION No.26957 OF 2005

% 25/04/2006

 # Arji Sankara Rao, S/o. Late Narasimhulu,

Aged about 50 years, R/o. Saiganesh

Apartment, E-2 Abid Nagar,

Akkayyapalem, Visakhapatnam

and two others. … Petitioners

Vs.

$1. Govt. of A.P., rep. by Secretary, Prohibition &

Excise Department, Secretariat, Hyderabad,

and others. … Respondents.

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> Head Note

! Counsel for the petitioners: Sri Vedula Venkataramana

^ Counsel for the respondents: 1 to 5: G.P. for Proh. & Excise

Counsel for the respondent Nos. 6 & 7: Sri E.Madanmohan Rao

Cases Referred:

2001 (5) SCC 212;

[2] 2005 (6) Supreme 243.

THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION No.26957 OF 2005

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25th April, 2006.

Between:

Arji Sankara Rao and others. .. Petitioners.

And

Government of Andhra Pradesh, represented

by Special Chief Secretary, Revenue (Excise-II)

Department, Secretariat, Hyderabad and others. ..Respondents.